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IN THE

Supreme Court of the United States

October Term, 1957

No. 423

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Petitioner,

vs.

EDWARD T. HYDE,
Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To The Honorable Supreme Court of the United States:

Petitioner, Great Northern Railway Company, respectfully prays that a writ of certiorari issue to review the judg-

ment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on June 27, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit dated December 18, 1956, is reported in 238 F.(2d) 852. It is therein stated that this case would seem to be an appropriate one in which to apply for certiorari. The opinion on rehearing of the United States Court of Appeals for the Eighth Circuit dated June 27, 1957, is not yet reported in the official reports. The opinions are printed in the appendix hereto, *infra*, App. 12 and App. 25, respectively.

JURISDICTION

The original judgment of the Court of Appeals was entered December 18, 1956 (App. 23) and the judgment on rehearing was entered June 27, 1957 (App. 38). The judgment entered June 27, 1957, vacated and set aside the judgment entered December 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether 28 U.S.C. 1651(a) confers supervisory control and power upon the Courts of Appeals to review an interlocutory order of a District Court transferring the venue of a case under 28 U.S.C. 1404(a) when the Court of Appeals finds that there was no adequate factual or legal basis for the transfer.

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. 1651(a) and 28 U.S.C. 1404(a). They are printed in the appendix, *infra*, App. 11.

STATEMENT

Respondent, Edward T. Hyde, (hereinafter referred to as "plaintiff") commenced an action on February 23, 1956, against the Petitioner, Great Northern Railway Company, (hereinafter referred to as "defendant") in the United States District Court for the District of Minnesota to recover damages for personal injuries suffered at Seattle, Washington. The action was brought under the provisions of 45 U.S.C. 51, et seq. (R. 1).

The defendant denied liability (R. 7) and moved the court for an order under 28 U.S.C. 1404(a) transferring the case to the United States District Court, Western District of Washington, for trial at Seattle, the city where the accident occurred and witnesses necessary for the trial resided (R. 8). This motion was heard before Judge Bell at which time the plaintiff suggested that if the court concluded that the case should not be tried in St. Paul that it be transferred to the United States District Court, Southern District of California, for trial at Los Angeles.

Judge Bell ordered the case transferred to Los Angeles, a location where no witnesses resided and a district where the defendant was not doing business. The defendant moved for a rehearing which was granted. Prior to the argument on rehearing the plaintiff filed a motion opposing the transfer to Seattle but asking the court to transfer the case to the Northern District of California, for trial at San Francisco, if

the court should decide that St. Paul was not the proper venue (R. 47). Judge Bell ordered the case transferred to San Francisco, also a location where no witnesses resided although a district where the defendant was doing business (R. 64).

The defendant on August 6, 1956, petitioned the Court of Appeals for the Eighth Circuit for alternative writs of prohibition and mandamus which were subsequently issued (R. 65, 79, 82).

The matter was argued before the Court of Appeals which filed its opinion and judgment December 18, 1856 (R. 1A App. 12). The defendant's aplication for a writ prohibiting the transfer to San Francisco and a writ of mandamus directing a transfer to Seattle was denied "upon the sole ground that the transfer order complained of by the defendant is not reviewable [by a Court of Appeals] by prohibition, mandamus or otherwise." In rendering this opinion the Court removed every fact issue from the case when it stated on p. 855:

> "• • we believe that there was no adequate factual or legal basis for the transfer. If the order transferring the case were subject to review for an erroneous exercise of a sound discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, • •."

A petition for rehearing was granted on the ground implications could be drawn from *LaBuy v. Howes Leather Co., Inc.*, 352 U.S. 249, decided January 14, 1957, which casts doubts upon the correctness and propriety of the opinion and judgment filed December 18, 1956 (R. 45A).

The matter was reargued before the Court of Appeals which filed its opinion and judgment on rehearing on June

27, 1957 (App. 25). This judgment vacated the judgment entered December 18, 1956, and again denied defendant's application for writs of prohibition and mandamus on the ground that the Court had no power to issue the writs and that the *LaBuy* decision did not alter the Court's original opinion. Judge Johnsen dissented (R. 51A).

REASONS FOR GRANTING THE WRIT

The decision below is a refusal of the Court of Appeals to exercise supervisory control of the District Court necessary for proper judicial administration in the federal system and to correct a judicial wrong for which the court below admits "an appeal from a final judgment in the case will be an inadequate remedy" *(Great Northern Railway Company v. Hyde,* 238 F(2) 852, 855; App. 17).

The decision of the Court of Appeals of the Eighth Circuit that it has no power to correct the judicial wrong in this case by way of mandamus and prohibition presents a direct conflict with decisions in other circuits upon an issue of procedural law of major importance in the administration of justice in the federal courts. It is clearly in conflict in principle with applicable decisions of this Court.

The necessity for settlement by this Court of the question herein presented is set forth by Judge Sanborn in the December 18, 1956, opinion of the court below. Therein he stated on p. 857, App. 22:

> "It is unfortunate that the question of the reviewability of a transfer order under Sec. 1651(a) has not as yet been put at rest. The Supreme Court, in *Norwood v. Kirkpatrick,* 349 U.S. 29, 33, 75 S. Ct. 544, 99 L. Ed. 789, found it unnecessary to determine whether mandamus or prohibition was a proper remedy to test the

validity of a transfer order. The instant case squarely presents that question and it would seem to be an appropriate case in which to apply for certiorari."

Judge Sanborn again reiterated this position in the opinion on rehearing dated June 27, 1957 (App. 27):

"It may be that we are unduly reluctant to undertake the review of discretionary orders of transfer under Sec. 1404(a), * * *. If so, we shall hope to be corrected."

Conflict Among the Circuits

The court below decided that under 28 U.S.C. 1651(a) it did not have either the power to review an order of a district court granting a motion under 28 U.S.C. 1404(a) for a transfer to another circuit or the power to direct the district court to transfer the case to the proper district for trial despite it's finding that there was no adequate factual or legal basis for the district court's order. This holding is in direct conflict with the decisions of the following Courts of Appeals:

Second Circuit—	*Ford Motor Co. v. Ryan,* 182 F(2) 329
Fifth Circuit—	*Atlantic Coast Line R. Co. v. Davis,* 185 F(2) 766
Sixth Circuit—	*Nicol v. Koscinski,* 188 F(2) 537
Seventh Circuit—	*Chicago, R. I. & P. R. Co. v. Igoe,* 212 F(2) 378

Ninth Circuit—	*Shapiro v. Bonanza Hotel Co.*, 185 F(2) 777
D. C. Circuit—	*Wiren v. Laws*, 194 F(2) 873

The various Courts of Appeals in the cases cited above held under similar circumstances that they had jurisdiction under Sec. 1651(a) to review orders of a district court either refusing to direct a transfer or granting a transfer to another circuit entered under Sec. 1404(a).

A contrary conclusion to the decisions above cited was reached by the Third Circuit in *All States Freight v. Modarelli*, 196 F(2) 1010; Fourth Circuit in *Clayton v. Warlick*, 232 F(2) 699; and the Eighth Circuit in the instant case. They held that they did not have the power to review by way of Sec 1651(a) an order of a district court under Sec. 1404(a) even though the Court abused its discretion in entering the order. The First Circuit in *In re Josephson*, 218 F(2) 174 at p. 183 served notice that "except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

The Court below recognized the divergence of opinion among the circuits when it stated in its opinion at p. 856, App. 20):

> "We find ourselves in complete accord with the opinion in *Clayton v. Warlick*, supra. As Chief Judge Parker says in that opinion, the expressions of the various circuits with respect to the reviewability of orders of transfer under § 1404(a), through the use of § 1651(a) are in hopeless conflict."

The conflict among the various circuits places litigants under identical situations in vastly different positions concerning the availability of mandamus under Sec. 1651(a) as a method of review of an order under Sec. 1404(a) depending upon the circuit in which the case is pending. These conflicts would necessarily be resolved by a review of the instant case by this Court.

Conflict With Decisions of This Court

Judge Johnsen pointed out in his dissenting opinion in the court below that the majority opinion is in conflict with both the majority and the minority opinions in *LaBuy v. Howes Leather Co., Inc.*, 352 U.S. 249. He stated (App. 30):

> "As to our power to consider and correct the clear abuse of discretion, in which all of us on the panel agree that the trial court here engaged in sending the case to San Francisco on the circumstances involved, I do not believe that any possible question can be viewed as existing under the majority opinion of the Supreme Court."

The *LaBuy* case was decided January 14, 1957, and held that a discretionary interlocutory order issued by a district court referring an anti-trust case to a master under Rule 53(b) was reviewable by a Court of Appeals under 28 U.S.C. 1651(a).

This Court held in the *LaBuy* decision on p. 255:

> "* * The question of naked power [of the Courts of Appeals to issue writs of mandamus to review interlocutory orders] has long been settled by this Court. As late as *Roche v. Evaporated Milk Association*, 319 U.S. 21 (1943), Mr. Chief Justice Stone reviewed the decisions and, in considering the power of the Courts of

Appeals to issue writs of mandamus, the Court held that 'the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court.' Id., at 25. The recodification of the All Writs Act in 1948, which consolidated old §§342 and 377 into the present § 1651(a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. See *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-383 (1953)."

There is no distinguishing feature between the instant case and the *LaBuy* case. Each involves review of a discretionary interlocutory order under 28 U.S.C. 1651(a). Each involves an abuse of judicial discretion by a district court which cannot be remedied or corrected on appeal from final judgment.

Even aside from the *LaBuy* case as this Court pointed out in that decision, it has long been the law a Court of Appeals has the power to issue the writs prayed for in the instant case. See *Roche v. Evaporated Milk Association*, 319 U.S. 21 and *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379.

The decision below is a refusal of the Court of Appeals to exercise supervisory control over the District Courts which in the *LaBuy* decision this Court held was necessary for the proper administration of the judicial system. It fosters further confusion among the Court of Appeals concerning a federal jurisdictional and procedural issue. The decision imposes upon this defendant and future litigants in the same or similar circumstances a judicial wrong which can only be corrected by the procedure approved by this Court under 28 U.S.C. 1651(a), there being no adequate remedy on appeal from final judgment.

CONCLUSION

It is respectfully submitted that because of the importance of the question involving a federal jurisdictional and procedural issue, and the existing conflicts among the circuits and with decisions of this Court, and because of the statements of the Court of Appeals of the Eighth Circuit of its desire to have this case reviewed by this Court, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statutes Involved

28 U.S.C. 1404(a)

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. 1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Opinion of Lower Court (December 18, 1956)
Great Northern Railway Company v. Hyde,
238 F (2) 852

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,630

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Application for Writ of Prohibition and Mandamus.

(December 18, 1956)

Don E. Engle (Edwin C. Matthias and Anthony Kane were with him on the brief,) for Relator-Petitioner.

Harry H. Peterson (Eugene A. Rerat was with him on the brief), for Plaintiff-Respondent and Respondents.

Before Sanborn, Woodrough and Whittaker, Circuit Judges.

Sanborn, Circuit Judge.

The vital question for decision in this case is whether Sec. 1651(a) of 28 U.S.C.[1] furnishes a means for reviewing an order of the District Court, not otherwise reviewable, transferring, under Sec. 1404(a) of 28 U.S.C.,[2] from the District of Minnesota to the Northern District of California a personal injury case arising out of an accident which occurred in the City of Seattle, Washington. We are asked to prohibit Judge Bell, acting for the United States District Court for the District of Minnesota, from effectuating his order transferring the case to the Northern District of California, and to command him to transfer it to the Western District of Washington for trial at Seattle.

The following are the facts upon which the application of the Great Northern Railway Company for a writ of prohibition and mandamus are based:

Edward T. Hyde, while working as a switch foreman for the Great Northern Railway Company in its yard at Seattle, on November 5, 1955, was seriously injured. He employed a Minneapolis attorney and brought an action on February 23, 1956, against the Railway Company, under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 et seq., in the United States District Court for the District of Minnesota, Third Division, to recover damages for his injuries. His claim was that the accident resulted from the negligence

[1] "Sec. 1651 Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[2] "Sec. 1404. Change of venue.

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

of the defendant and a violation by it of the Federal Safety Appliance Act.

The defendant on March 16, 1956, filed its answer, denying liability, and gave notice of a motion to transfer the case, under Sec. 1404(a), to the Western District of Washington, for trial at Seattle. The motion was based upon affidavits showing that, for the convenienceof material witnesses and the saving of unnecessary expense to the defendant, Seattle, where the accident occurred, where the plaintiff resided at the time of the accident, and where he received medical and hospital care and treatment from the time of his injury to January 30, 1956, was the most convenient and appropriate place for the trial of the case.

In opposition to the defendant's motion, counsel for the plaintiff lodged with the court an affidavit stating that the defendant had its home office in Minnesota, where it was incorporated; that the burden of producing medical evidence was on the plaintiff; and that such evidence was as readily available in Minnesota as elsewhere. An affidavit of the plaintiff's wife, also lodged with the court, stated that from November 6, 1955, to January 30, 1956, the plaintiff was in a hospital at Seattle under the care of a Great Northern Railway Company physician; that, upon the physician's recommendation, the plaintiff was transferred to the Veteran's Hospital at Long Beach, California, for treatment, and has been there since February 1, 1956; that she and the plaintiff had decided to make California their home; that, because of his injuries, it is very difficult for the plaintiff to travel; that it would be better if the trial of this case could be had in the city of Los Angeles, California; that she and the plaintiff "would prefer that the case be tried in St. Paul, Minnesota, for the reason that when her said husband is discharged from

the Veterans' Hospital in Long Beach, it is her intention to bring him to the State of Minnesota for medical examinations and further treatment, and" she "feels that if the case cannot be tried in the City of St. Paul, State of Minnesota, that it would be more convenient for her said husband if the case could be transferred to the State of California," for trial at Los Angeles.

On May 28, 1956, a hearing was had before Judge Bell on the motion of the defendant for a transfer of the case to the Western District of Washington and the opposition of the plaintiff and his request or suggestion that if the court determined that the case should not be tried in the District of Minnesota, the transfer be to the Southern District of California, Central Division.

Judge Bell on June 20, 1956, denied the motion of the defendant to transfer the case to the Western District of Washington, and, instead, transferred it to the Southern District of California, for trial at Los Angeles.

The defendant on June 26, 1956, moved Judge Bell for an order staying the effect of his transfer order of June 20, 1956, upon the ground, among others, that there had been no showing that the action could have been brought in the Southern District of California. The motion for a stay was granted. On July 3, 1956, the United States District Court for the Southern District of California, on motion of the defendant, returned the case to the District of Minnesota.

On July 17, 1956, Judge Bell granted a motion of the defendant for a rehearing of its motion for a transfer of the case to the Western District of Washington. Thereafter on July 28, 1956, the plaintiff filed a motion opposing the transfer, but asking the court to transfer the case to the Northern District of California, for trial at San Francisco, if the court

should decide that the District of Minnesota was not the proper venue.

The rehearing of the defendant's motion to transfer the case to the Western District of Washington, for trial at Seattle, and the hearing of the motion of the plaintiff that, if transferred at all, the case be transferred to the Northern District of California, for trial at San Francisco, came on before Judge Bell on July 31, 1956. On August 2, 1956, he filed an order denying the defendant's motion and transferring the case to the Northern District of California.

The General Offices of the defendant are in St. Paul, Minnesota, where the case would have been for trial had it not been transferred. St. Paul adjoins Minneapolis, where the attorney for the plaintiff resides and has his office, but is otherwise unrelated in any way to the plaintiff's action or the claim upon which it is based.

The city of San Francisco, where it is conceded the plaintiff's action could have been brought, is nearer the Veterans' Hospital at Long Beach than is Seattle or St. Paul. St. Paul, however, is farther from Long Beach than is Seattle. Aside from the proximity of San Francisco to Long Beach, where the plaintiff and his wife have resided since he entered the Veterans' Hospital, San Francisco has no connection with his action.

Judge Bell, in his return to the defendant's application for a writ of prohibition and mandamus, states that, in transferring the case to the Northern District of California, the court properly exercised the judicial power and discretion vested in it by Sec. 1404(a), and that the order of transfer was in accordance with that section "in that it was for the convenience of the parties and witnesses, in the interest of justice."

While we do not question the sincerity of the belief of Judge Bell that the transfer of the plaintiff's case for trial at San Francisco was made in the exercise of a sound judicial discretion and in conformity with the letter and spirit of Sec. 1404(a), we believe that there was no adequate factual or legal basis for the transfer. If the order transferring the case were subject to review for an erroneous exercise of a sound discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, where the plaintiff's claim arose and where most of the persons reside who will be called to give evidence at the trial. We are of the opinion, however, that the transfer order is not subject to review by prohibition or mandamus, despite the fact that it is not an appealable order and that an appeal from a final judgment in the case will be an inadequate remedy for the erroneous transfer.

This Court held in *Carr v. Donohoe*, 201 F. 2d 426, that Sec. 1651(a) of 28 U.S.C. did not furnish a means for reviewing an order transferring an action from one District to another District within this Circuit. We think there is no controlling distinction between the *Carr* case and the instant case so far as the question of reviewability, under Sec. 1651(a), of transfer orders is concerned. In the *Carr* case we pointed to the intracircuit transfer merely to show that there was no possibility of the appellate jurisdiction of this Court being affected in any way by such a transfer.

In the case of *In re Josephson*, 1 Cir. 218 F. 2d 174, the United States Court of Appeals for the First Circuit, in dealing with the question of reviewability of a transfer order, said in an opinion by Chief Judge Magruder (page 181 of 218 F. 2d):

"* * * But assuming that if the transfer order is ever to be reviewed it must be now, we do not forget that appellate review is not of the essence of due process. See *McKane v. Durston*, 1894, 153 U.S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867. Particularly, there may be strong reasons of policy why litigation should not be delayed by appellate review of an administrative order of the sort here involved. It is not unlike an order by a federal district court remanding a case to the state court from which it had been removed. Here Congress has specifically provided that such an order 'is not reviewable on appeal or otherwise.' 28 U.S.C. Sec. 1447(d), as amended. In certain situations, the fact that a prejudicial order unless presently reviewable can never be corrected on appeal may be a consideration bearing on whether the order is to be deemed a 'final decision' from which an appeal may be taken under 28 U.S.C. Sec. 1291. See *Cobbledick v. United States*, 1940, 309 U. S. 323, 328-330, 60 S. Ct. 540, 84 L. Ed. 783. But we do not have such a situation here, since it is conceded that the transfer order now in question is an unappealable interlocutory order."

The position taken by the First Circuit in that case is stated on page 183 of 218 F. 2d, as follows:

"Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

Substantially the same position had been taken by the Third Circuit in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010. Judge Goodrich, who wrote the opinion in that case, after stating the truism that "Every litigant against

whom the transfer issue is decided naturally thinks the judge was wrong," said:

> "We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon. * * *"

He concluded the opinion as follows:

> "We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute. But we cannot escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits: first, prolonged litigation to determine the place where a case is to be tried; and, second, the merits of the alleged cause of action itself."

The Fourth Circuit, in a recent opinion by Chief Judge Parker in the case of *Clayton v. Warlick*, 232 F. 2d 699, has held that, while mandamus or prohibition will lie to compel a District Judge to exercise the discretion conferred upon him by Sec. 1404(a) or to prevent him from transferring a case to a District to which, as a matter of law, it is not transferable, Sec. 1651(a) does not afford a means for the review of an order such as that here involved. The court said (page 706 of 232 F. 2d):

> "The correct rule to be applied, we think, is the same as that applied in the case of other interlocutory orders, i.e., where the judge has exercised a power, conferred upon him by law, mandamus may not be availed of to review the exercise of the power in the face of the restriction placed by Congress on the review of interlocutory orders. The distinction which we think applicable was that drawn by the Supreme Court in *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217, 65 S. Ct. 1130, 1133, 89 L. Ed. 1566, where the court said:

"'When Congress withholds interlocutory reviews, Sec. 262 [now 28 U.S.C. Sec. 1651] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of Sec. 262.'

"See also the concurring opinion of Judge Swan in *Ford Motor Co. v. Ryan*, 2 Cir., 182 F. 2d 329, 332, and the decision of the Court of Appeals of the Second Circuit in *Ward Baking Co. v. Holtzoff*, 2 Cir., 164 F. 2d 34, 36 where the court said:

"'Section 262 of the Judicial Code, 28 U.S.C.A. Sec. 377 [now 28 U.S.C. Sec. 1651] cannot be availed of to correct a mere error in the exercise of conceded judicial power, but may be used to prevent usurpation of power, if "the lower court is clearly without jurisdiction."'"

We find ourselves in complete accord with the opinion in *Clayton v. Warlick*, supra. As Chief Judge Parker says in that opinion, the expressions of the various circuits with respect to the reviewability of orders of transfer under Sec. 1404(a), through the use of Sec. 1651(a), are in hopeless conflict.

This Court has, perhaps, been more conservative than other courts of appeals in resisting the use of Sec. 1651(a) as a device for reviewing nonappealable interlocutory orders. In an opinion written for this Court by Judge Walter H. Sanborn in 1927, in *Hosey v. Kennamer*, 8 Cir., 21 F. 2d 64, 65, he said:

"* * * When a question has been decided by the officer, or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may

not issue to review or reverse that decision or to compel another." It may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officer or officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision. *Kimberlin v. Commission to Five Cirilized Tribes* (C.C.A.) 104 F. 653, 655; *Henderson Tire & Rubber Co. v. Reeves & Otis, Judges* (C.C.A. 14 F. (2d) 903, 906; *Minnesota Moline Plow Co. v. Dowagiac Mfg. Co.* (C.C.A.) 126 F. 746, 748; *Brictson Mfg. Co. v. Munger, Judge* (C.C.A. 20 F. (2d) 793."

See, also: *Sound Investment & Realty Co. v. Harper*, 8 Cir., 178 F. 2d 274; *Larsen v. Nordbye*, 8 Cir., 181 F. 2d 765; *Larsen v. Switzer*, 8 Cir., 183 F. 2d 850; *Leimer v. Reeves*, 8 Cir., 184 F. 2d 441; *Hydraulic Press Mfg. Co. v. Moore*, 8 Cir., 185 F. 2d 800, 802-803; *Petsel v. Riley*, 8 Cir., 192 F. 2d 954.

This Court has used its power to issue writs of mandamus or prohibition to compel a District Judge to exercise a jurisdiction which the law has made it his duty to exercise (*Barber Asphalt Paving Co. v. Morris*, 8 Cir., 132 F. 945, 956) or to prevent a judge from exercising a power that he clearly does not have. We have studiously refrained from using mandamus to tell a judge what decision he must make in the exercise of a jurisdiction and discretion intrusted to him by law.

The Supreme Court has said:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * As extraordinary remedies, they are reserved for really extraordinary cases."

Ex Parte Fahey, 332 U.S. 258, 259-260; *Ex Parte Collett*, 337 U.S. 55, 72. We do not regard controversies between litigants, and between their counsel, as to where a case can most conveniently, fairly, efficiently and economically be tried as "really extraordinary."

It is unfortunate that the question of the reviewability of a transfer order under Sec. 1651(a) has not as yet been put at rest. The Supreme Court, in *Norwood v. Kirkpatrick*, 349 U.S. 29, 33, found it unnecessary to determine whether mandamus or prohibition was a proper remedy to test the validity of a transfer order. The instant case squarely presents that question and it would seem to be an appropriate case in which to apply for certiorari.

So far as this Court is concerned, we shall hereafter grant leave to apply for mandamus or prohibition to review transfer orders if and when an Act of Congress or a decision of the Supreme Court requires us to do so. We think that, in the interest of an expeditious, efficient and orderly administration of justice, controversies about venue should be finally settled and determined at the District Court level.

The application of the defendant for a writ prohibiting the transfer of the plaintiff's case to the Northern District of California and directing its transfer to the Western District of Washington, is denied upon the sole ground that the transfer order complained of by the defendant is not reviewable here by prohibition, mandamus or otherwise.

Application denied.

VACATED

Judgment of Lower Court (December 18, 1956)

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15630—September Term, 1956.
Tuesday, December 18, 1956.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Relator-Petitioner,

vs.

EDWARD T. HYDE,
Plaintiff-Respondent,

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Application for Writ of Prohibition and Mandamus.

This cause came on to be heard on the Application of Relator-Petitioner, Great Northern Railway Company, for a Writ of Prohibition and Mandamus, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Application of the Defendant, Great Northern Railway Company, a Corporation, in the United States District Court for the District of Minnesota, for a Writ prohibiting the transfer of the Plaintiff's (Edward T. Hyde) case to the Northern District of California and directing its transfer to the Western District of Washington, be and is by this Court hereby denied upon the sole ground that the transfer order complained of by the Defendant is not reviewable in this Court by prohibition, mandamus, or otherwise.

And it is further Ordered and Adjudged by this Court that the Alternative Writ of Prohibition and the Alternative Writ of Mandamus heretofore issued by this Court in this matter be, and they are each hereby, discharged and dismissed.

December 18, 1956.

Opinion of Lower Court (June 27, 1957)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,630

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Rehearing of Application for Writ of Prohibition and Mandamus.

[June 27, 1957.]

D. E. Engle (Edwin C. Matthias and Anthony Kane were with him on the brief), for Relator-Petitioner.

Harry H. Peterson (Eugene A. Rerat was with him on the brief), for Plaintiff-Respondent and Respondents.

Before SANBORN, WOODROUGH and JOHNSEN, Circuit Judges.

SANBORN, Circuit Judge.

Upon the original submission of this application for a writ of prohibition and mandamus, this Court ruled that an order of Judge Bell transfering, under 28 U.S.C. § 1404 (a), the case of *Edward T. Hyde* v. *Great Northern Railway Company* from the District of Minnesota, where it was brought, to the Northern District of California (where it could have been brought) for trial, was not reviewable under 28 U.S.C. § 1651(a), for an erroneous exercise of discretion. We declined to prohibit the Judge from carrying into effect the transfer order, and refused to command him to transfer the case to the Western District of Washington. 238 F.2d 852.

Shortly after our opinion was filed, the Supreme Court decided *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249. It held in that case that the United States Court of Appeals for the Seventh Circuit had discretionary and supervisory power under the All Writs Act, 28 U.S.C. § 1651(a), to require Judge La Buy to vacate orders made under Rule 53(b) of the Federal Rules of Civil Procedure, referring two antitrust cases to a master for trial.

The petitioner in the instant case sought a rehearing upon the ground that the *La Buy* decision had, in effect, impliedly and inferentially demonstrated that this Court had erred in holding that the transfer order of Judge Bell was not reviewable under §1651(a). We granted a rehearing, and the case has been reargued.

There is much force in the petitioner's contention that, since the Court of Appeals for the Seventh Circuit had discretionary power to compel Judge La Buy to vacate his orders of reference, for abusing his discretion, this Court necessarily has discretionary power to compel, and should

compel, Judge Bell to vacate his order transferring the instant case to the Northern District of California, and to command him to transfer the case to the Western District of Washington.

Just how far the discretionary and supervisory power of a Court of Appeals, under § 1651(a), to deal with transfer orders made under § 1404(a) extends has not as yet been determined. We do not question our power to command the vacation of an order transferring a case to a district to which, as a matter of law, the case was not transferrable. Here we have an erroneous exercise of judicial discretion because the factual situation did not warrant the transfer of the case to the Northern District of California under § 1404(a).

The *La Buy* case, as the Supreme Court took pains to point out, presented an extreme situation of a District Judge abusing judicial power which "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." 352 U.S., at 256.

Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances.

It may be that we are unduly reluctant to undertake the review of discretionary orders of transfer under §1404(a), involving, as they usually do, controversial fact questions as to where cases can most conveniently and appropriately be tried. If so, we shall hope to be corrected.

Notwithstanding the *La Buy* decision, we feel justified in adhering to our former views that our power to issue writs under §1651(a) does not warrant us to command

Judge Bell to vacate his order of transfer and to enter an order transferring the case to the Western District of Washington.

Application denied.

JOHNSEN, Circuit Judge, dissenting.

The original opinion in this case, 238 F.2d 852, held that, under the All Writs Act, 28 U.S.C.A. § 1651(a), a Court of Appeals has power or authority to issue a writ of mandamus or prohibition against a District Judge, only "to compel a District Judge to exercise a jurisdiction which the law has made it his duty to exercise, * * * or to prevent a judge from exercising a power that he clearly does not have." P. 857.

As indicated by the opinion, the panel of judges which rendered the decision was of the view that, if the act involved was a matter which the District Judge legally had power to do or to refuse to do, his action was in no way subject to being touched by a supervisory or auxiliary writ on the part of the Court of Appeals, even though the doing or refusing might otherwise amount to arbitrariness or abuse of discretion on the factual elements of the particular situation.

Hence, the panel refused, because of believed lack of power, to touch an order of the District Judge, made under 28 U.S.C.A. § 1404(a), denying a motion of the defendant for transfer of the case from St. Paul, Minnesota, to Seattle, Washington, and granting instead an alternative motion of the plaintiff "that in the event that the Court determines that the United States District Court, said District of Minne-

sota, Third Division, sitting at St. Paul, Minnesota, is not a proper venue for the trial of said cause, and only in that event, that the Court make its Order transferring said cause to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California."

The original opinion stated that "we believe that there was no adequate factual or legal basis for the transfer" made to San Francisco, and declared that, "If the order transferring the case were subject to review for an erroneous exercise of discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, where the plaintiff's claim arose and where most of the persons reside who will be called to give evidence at the trial."

But, added the Court, "We are of the opinion, however, that the transfer order is not subject to review by prohibition or mandamus, despite the fact that it is not an appealable order and that an appeal from a final judgment in the case will be an inadequate remedy for the erroneous transfer." P. 855. And in summary it said that "We think that, in the interest of an expeditious, efficient and orderly administration of justice, controversies about venue should be finally settled and determined at the District Court level." P. 857.

On this rehearing of the case, granted after the decision of the Supreme Court in *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249, 77 S. Ct. 309, (and in which hearing I have been assigned to take the place of a member of the original panel), the majority of the Court have adhered to the views expressed in the previous opinion, saying: "We do not question our power to command the vacation

of an order transferring a case to a district to which, as a matter of law, the case was not transferrable. Here we have an erroneous exercise of judicial discretion because the factual situation did not warrant the transfer of the case to the Northern District of California under § 1404(a). * * * Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances * * * Notwithstanding the *La Buy* decision, we feel justified in adhering to our former views that our power to issue writs under § 1651(a) does not warrant us to command Judge Bell to vacate his order of transfer and to enter an order transferring the case to the Western District of Washington."

This, in its effect, is a holding that a Court of Appeals is utterly without power, under the All Writs Act, to touch any order of a District Court, under § 1404(a), in the field of transfer, whether the order made is one in grant or in denial of a requested venue change, and whether it involves a transfer outside (as here) or within (see *Carr* v. *Donohoe*, 8 Cir., 201 F. 2d 426) the circuit, save only that the Court may "command the vacation of an order transferring a case to a district to which, as a matter of law, the case was not transferable".

I believe—certainly as to a transfer made outside the circuit at least, which is the situation here—that this holding of lack of power is in conflict with both the majority opinion and the minority opinion in the *La Buy* case.

As to our power to consider and correct the clear abuse of discretion, in which all of us on the panel agree that the trial court here engaged in sending the case to San

Francisco on the circumstances involved, I do not believe that any possible question can be viewed as existing under the majority opinion of the Supreme Court. And even under the narrower concept of power, than that recognized by the majority, which the minority felt that § 1651(a) should be regarded as allowing a Court of Appeals to exercise, the latter group said: "The focal point posed for a Court of Appeals by a petition for the issuance of a writ is whether the action of the District Court tends to frustrate or impede the ultimate exercise by a Court of Appeals of its appellate jurisdiction granted in some other provision of the law. The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision". 352 U.S. at page 264, 77 S. Ct. at pages 317 and 318.

Thus, under both the majority and the minority concepts in the *La Buy* case, it seems to me that we manifestly have the power, and corollarily owe the duty, of nullifying by prohibition the transfer order which the District Court made, since, as the original opinion states, "there was no adequate factual or legal basis for the transfer, and, as the rehearing opinion reiterates, "the factual situation did not warrant the transfer of the case to the Northern District of California", and San Francisco was a place "to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances".

Whether we have the power to go further and to require the District Court by mandamus to transfer the case to Seattle (where we all agree that on the circumstances shown the case ought in the interest of justice to have its

trial) is a question that extends a degree beyond that involved in the matter of prohibiting a transfer to San Francisco. The minority opinion in the *La Buy* case probably must be read as not recognizing such a power. I interpret the expressions in the majority opinion, however, as impliedly recognizing power in a Court of Appeals to compel a District Judge to make a transfer out of the circuit, where on the circumstances his refusal to do so amounts legally to judicial arbitrariness or—in milder phrase—constitutes "a clear abuse of discretion".

Before discussing this aspect of the statute, I would add that, without regard to it, it is possible in any event, on a prohibiting of the transfer made to San Francisco, to leave the path open to the District Judge, by so expressly indicating, to reconsider the motion of the defendant for transfer of the case to Seattle. The Court's order of transfer to San Francisco was made under the condition of plaintiff's alternative motion that such action should be taken only "in the event that the Court determines that St. Paul, Minnesota, is not a proper venue for the trial". In granting the alternative motion, the Court thus must have been of the view that the case ought not to be retained in St. Paul for trial (as we here all agree that it should not). Prohibition of the transfer made to San Francisco (for which at the minimum we have power and responsibility under the statute, in my reading of both the majority and the minority opinions in the *La Buy* case) would of itself in all likelihood result in the District Judge making transfer of the case to Seattle, if our opinion left no doubt as to our intent not to preclude him from reconsidering the defendant's motion.

But I do not think that we are required to stop here. As I have indicated, I am of the conviction that under the statute and the majority opinion in the *La Buy* case our power and our duty extend beyond this minimal concept. I believe that we have the power, not merely to prohibit the District Judge from transferring the case to San Francisco, but as well to direct him to make transfer of it to Seattle for trial.

As the majority opinion in the *La Buy case* points out, 352 U.S. at pages 257 and 258, 77 S. Ct. at page 314, the general test recognized and applied in the Court's previous decisions, for the existence and use of the power granted by the All Writs Act, is whether the thing sought to be commanded or prohibited constitutes as a matter of law "usurpation of judicial power" or "clear abuse of discretion", on the part of the District Judge. Both are equal foundations under the Act for the existence of the power. And inherent in the exercise of the power under either is, in some measure at least, an element of supervisory responsibility on the part of the Courts of Appeals as to the District Courts, which cannot be escaped in the proper functioning of our federal judicial system. As the majority opinion said, 352 U.S. at pages 259 and 260, 77 S. Ct. at page 315, "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system".

I can see nothing in the All Writs Act that militates against a reading and application of it in relation to this concept. It should be noted that the language of the Act, that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appro-

priate in aid of their respective jurisdictions and agreeable to the usages and principles of law", is collective and not individualistic in its court specification. The statute does not say that each Court of Appeals (and each District Court) may issue writs only to preserve, foster or facilitate its own individual jurisdiction, but generally and collectively that writs are entitled to be issued by them in aid of their respective jurisdictions as such courts. In other words, it seems to me that the grant of power to them is as much one in their class or system significance as in their individual functioning.

This fact, I think, has even more apparency under the language of 28 U.S.C., 1940 ed., § 377, preceding the 1948 revision, that "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law". The Revisor's Note, 28 U.S.C.A. following § 1651, makes clear that the language used in § 1651, under the 1948 revision, was not intended to change the substance of the provision quoted but represented merely a change in phraseology.

It is on the basis of the concept of the statute which I have expressed that I regard us as having the power in the present situation to go beyond merely prohibiting the transfer attempted to San Francisco, and to direct the transfer, which should have been made, to Seattle. As a member of the Courts of Appeals system and in my responsibility for the achievement of justice thereunder, I am as much concerned about whether a case pending in this circuit, to which the jurisdiction of this Court thus

projectively or constructively has an existing tie and reach, has unwarrantedly been denied a transfer to another circuit, as about whether the case has improperly been made the subject of such an outside transfer.

Equally in both situations, an injustice is being perpetrated in this circuit—a judicial wrong for which, as the original opinion in the present case admits, 238 F. 2d at page 855, "an appeal from a final judgment in the case will be an inadequate remedy". If the injustice attendant upon an unwarranted grant or denial of a transfer is to be prevented in the federal judicial system (and it should be remembered that § 1404(a) does not say that the action of the District Court shall be final), it can only be done through the use of the power vested in the Courts of Appeals, under the All Writs Act, to aid or facilitate generally their jurisdiction or review function. The presence of a case in the judicial channel of a circuit to me sufficiently provides the tie or reach of constructive jurisdiction necessary to give rise to the existence of the power in the Court of Appeals for the circuit. And the correction of the injustice done by an unwarranted grant or denial of a transfer, whose harm cannot ordinarily be otherwise eliminated, is, it seems to me, in its relationship to the achieving of a fair result in the case, a matter that properly can be regarded, under the statute, as being in aid of a Court of Appeals' constructive jurisdiction or the accomplishing of its review function.

I have indicated that I view the statute as meaning, and the majority opinion in the *La Buy* case as recognizing, that the Courts of Appeals have power under the All Writs Act to command or prohibit any act on the part of a District Judge, which constitute as a matter of law

either "usurpation of judicial power" or "clear abuse of discretion", where such act is one which is capable of affecting the result in the case, and whose harm an appeal from the final judgment is not practicably capable of undoing. An unwarranted granting or denial of a transfer will ordinarily fall in that category.

This does not mean, however, that I think there is a right to bother a Court of Appeals in every situation of grant or denial of transfer by the District Court. Usurpation of judicial power, such as an attempt to transfer a case to a district or division where it could not have been brought, or clear abuse of discretion in granting or denying the transfer, amounting to legal arbitrariness, must exist as a basis for the Court of Appeals' exercise of its power under the All Writs Act in such a situation. A Court of Appeals must not assume to use the All Writs Act simply to set its judgment up against that of the District Court. If the facts of the situation reasonably afford a basis for variance in judgment, and if the judgment exercised by the District Court is not without rational ground on the circumstances as a whole, there is no right whatsoever in the Court of Appeals to interfere.

Moreover, it must be borne in mind that, beyond these tests, there also is an element of sound discretion, which a Court of Appeals has the right and duty to exercise in relation to the issuance of any extraordinary writ. For example, a situation might exist in which the District Court had been guilty of a clear abuse of discretion on the facts, but in which the Court of Appeals was not impressed as to the likelihood of any grave or substantial harm being done thereby. The Courts of Appeals should properly lean toward such and other guarded restraint in

their exercise of extraordinary writ power. They must not allow themselves to become guilty of needlessly curbing or compelling action on the part of the District Court or of delaying that Court's work and functions. In other words, their exercise of power under the All Writs Act must be such as to make it clear to the bar that they will not engage in the entertainment of loose applications for intermediate writs, and that such a writ can be hoped to be obtained only in extreme, flagrant and compelled cases, where the interests of justice realistically impress as having been substantially prejudiced.

These cautions have been sought to be impressed in the majority opinion in the *La Buy* case, and I shall not discuss them further. They are a bit outside what is necessary to my dissent from the holding of the majority in the present situation. That holding is, as I have previously pointed out, that there exists no power in a Court of Appeals under the All Writs Act to touch any order of the District Court relating to transfer, whether in grant or denial thereof, except only that the transfer of a case to a place where the action could not have been brought may properly be prohibited. An arbitrary or unwarranted transfer of a case to another circuit, such as is the situation here, is not under the majority opinion subject to reach by a Court of Appeals under the All Writs Act.

In summary, I think this holding of lack of power to prohibit the unwarranted transfer attempted to San Francisco is legally untenable, and I also believe that we have the power to direct the District Court to make transfer of the case to Seattle, which we all agree ought to be its proper trial situs in the circumstances shown.

Judgment Appealed From (June 27, 1957)

(JUDGMENT)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,630
September Term, 1956. Thursday, June 27, 1957.

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Application for Writ of Prohibition and Mandamus.

This cause came on to be heard on the Application of Relator-Petitioner, Great Northern Railway Company, for a Writ of Prohibition and Mandamus, after rehearing granted March 7, 1957, and was reargued by counsel.

After due consideration, It is now here Ordered and Adjudged by this Court, that the judgment of this Court entered December 18, 1956, in this matter, be, and the same is hereby, vacated, set aside and held for naught.

It is further Ordered and Adjudged by this Court, on the opinion filed December 18, 1956, and the majority opinion filed June 27, 1957, after rehearing granted, that the Application of the Defendant, Great Northern Railway Company, a Corporation, in the United States District Court for the District of Minnesota, for a Writ prohibiting the transfer of the Plaintiff's (Edward T. Hyde) case to the Northern District of California and directing its transfer to the Western District of Washington, be, and is by this Court, hereby denied.

And it is further Ordered and Adjudged by this Court that the Alternative Writ of Prohibition and the Alternative Writ of Mandamus heretofore issued by this Court in this matter be, and they are each hereby, discharged and dismissed.

June 27, 1957.